

The present appeal comes before the Appeals Board because the Administrative Law Judge declined to enter a preliminary order requiring respondent to pay certain medical expenses. The Administrative Law Judge explains in the record that he does not consider himself to have the authority to order, at a preliminary hearing, the payment of

medical expenses incurred by claimant prior to filing of claimant's Application for Preliminary Hearing. The court cites K.S.A. 44-534a(a)(2) which allows for an award of temporary total disability compensation which predates the filing of the application "if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date" The statute gives no such specific authority with regard to an award for medical compensation.

The Appeals Board has limited jurisdiction to review preliminary hearing orders. K.S.A. 44-551(b)(2)(A), as amended by S.B. 59 (1995), provides that "[i]f an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing." In addition, K.S.A. 44-534a(a)(2) lists several findings concerning issues which, if in dispute, are to be considered jurisdictional and subject to review by the Board. A finding concerning payment of a particular medical bill or bills is not one of those jurisdictional issues.

K.S.A. 44-534a gives an Administrative Law Judge the authority to conduct a preliminary hearing which shall be summary in nature and "[u]pon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation" (emphasis added) K.S.A. 44-534a(a)(2). The employee's entitlement to compensation is not disputed. What is disputed is the Administrative Law Judge's authority to award the benefits requested at preliminary hearing. That is what makes this issue jurisdictional and therefore appealable to the Appeals Board from a preliminary order. In other words, it is not that the Administrative Law Judge declined to order payment of the medical bills that makes this a jurisdictional issue, but rather his reason for not doing so.

There is no question that the awarding of preliminary benefits is discretionary and not mandatory. Accordingly, the second issue raised by claimant as to whether or not the medical bills should be ordered paid is not a jurisdictional issue and therefore is not appealable to the Appeals Board from a preliminary hearing.

The Appeals Board disagrees with the interpretation given by the Administrative Law Judge to K.S.A. 44-534a concerning his authority to order the requested medical benefits. K.A.R. 51-3-5a provides in pertinent part that:

"Compensation shall be awarded by the administrative law judge, if appropriate, for temporary total disability compensation and medical compensation from the date of receipt of the application for preliminary hearing by the division of workers' compensation. Except in highly unusual circumstances, the administrative law judge shall not award compensation for the period of time prior to the filing date of the application." (emphasis added)

K.A.R. 51-3-5a is clearly in need of amendment in light of the 1993 changes in the Workers Compensation Act. It still refers to Director's reviews of preliminary hearing awards which, of course, no longer exist. It also refers to the basis for appeal of preliminary hearing awards, which obviously have been changed. However, the portion pertaining to the Administrative Law Judge's authority to award compensation prior to the date of the filing of the application for preliminary hearing, clearly supports the claimant's position. The regulation acknowledges that the Administrative Law Judge has such authority, if the Judge finds highly unusual circumstances to be present.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the April 12, 1995, Order Denying Compensation should be, and is hereby, reversed and remanded to the Administrative Law Judge for a determination of whether there exists highly unusual circumstances for the awarding of the requested medical compensation.

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Ottawa, Kansas
Gregory D. Worth, Lenexa, Kansas
James R. Ward, Administrative Law Judge
Philip S. Harness, Director